IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 78-1341

JOE NATHAN TUBBS,

Respondent,

VERSUS

RICHARD WALL

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO.

JOE NATHAN TUBBS,
Respondent,

VERSUS

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Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit which vacated and remanded the Judgment of the United States District Court for the Middle District of Louisiana which dismissed respondent's complaint.

CITATIONS TO OPINIONS BELOW

The Report of Magistrate Polozola in the United States District Court for the Middle District of Louisiana was unreported and is attached hereto as Appendix A, infra.

The Judgment Order of Judge West in the United States District Court for the Middle District of Louisiana was unreported and is attached hereto as Appendix B, infra.

The opinion of the United States Court of Appeals for the Fifth Circuit was unreported and is attached hereto as Appendix C, infra.

The opinion of the United States Court of Appeal for the Fifth Circuit in the reported case of *Mitchell v. Beaubouef*, 581 F.2d 412 (5th Cir., 1978), is attached hereto as Appendix D.

JURISDICTION

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit is dated October 5, 1978, A Motion for Rehearing En Banc was denied on December 1, 1978. The Judgment Order from the United States District Court for the Middle District of Louisiana is dated July 20, 1977. The Magistrate's Report from the United States District Court for the Middle District of Louisiana is dated July 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

The following questions are presented by this petition:

(1) What is the relationship between 28 U.S.C. §1915(d) an d the Federal Rules of Civil Procedure?

(2) What may a district court do to determine if a pro se inmate suit, filed in forma pauperis under 28 U.S.C. §1915(a), is frivolous under 28 U.S.C. §1915(d)?

(3) If the district court's procedure in the present case does not conform to the Federal Rules of Civil Procedure, is it proper for a determiniation of frivolity or malice under 28 U.S.C. §1915(d)?

(4) May a district court hear evidence to determine if a pauper suit should be dismissed as frivolous or malicious under 28 U.S.C. §1915(d before allowing the suit to proceed in accordance with the Federal Rules of Civil Procedure?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portions of 28 U.S.C. §1915 are:

28 U.S.C. §1915(a) which provides:

> "(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefore, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

and 28 U.S.C. §1915(d) which provides:

> "(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

STATEMENT OF FACTS

Plaintiff-respondent, an inmate at Louisiana State Penitentiary at Angola, Louisiana, filed this 42 U.S.C. §1983 action in the United States District Court for the Middle District of Louisiana alleging that he had been deprived of access to the Education Building located on the prison grounds.

The District Court docketed the case and allowed plaintiff-respondent to proceed in forma pauperis under 28 U.S.C. §1915(a). The case was then referred to the United States Magistrate under 28 U.S.C. §636(b)(1)(B). The Magistrate, in accordance with the procedure devised by the District Court for the management of such pro se inmate cases, stayed the suit, ordered service of the complaint, and ordered the Louisiana Department of Corrections to submit to the court within 60 days a report concerning the circumstances surrounding the complaint. This procedure has been approved by the district court in *Michelle v. Henderson*, C.A. #74-296 (M.D., LA 1974). After the report was filed, the Magistrate reviewed it and the pleadings to determine if the complaint was frivolous. The Magistrate found that plaintiff has not been denied access to the Education Building nor is he

presently being denied access. In addition, the Magistrate found that plaintiff had not been denied any federally protected rights. The Magistrate recommended that the case be dismissed with prejudice because Plaintiff-respondent's suit was frivolous.

In accordance with the Magistrate's recommendations, the District Court dismissed the case with prejudice. Plaintiff-respondent then appealed and the panel rendered its decision to vacate the dismissal of plaintiff's complaint and to remand for reconsideration by the district court in light of the procedural dictates set forth in *Mitchell v. Beaubouef*, 581 F.2d 412 (5th Cir., 1978).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it totally negates the discretionary power of the district courts to dismiss in forma pauperis suits as frivolous or malicious pursuant to 28 U.S.C. §1915(d).

The use of the judicial system is subject to great abuse by prisoners filing pro se Civil Rights actions in forma pauperis. In recent years, the federal courts have assumed an increasing burden of lawsuits by federal and state prisoners. The normal basis for the claims of prisoners is an allegation that some constitutional right has been violated pursuant to 42 U.S.C. §1983.

These inmate suits are almost always brought it forma pauperis and usually pro se. It is well established that upon a showing of poverty under

28 U.S.C. §1915(a), an inmate must be allowed to file his complaint in forma pauperis. *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir., 1976). In addition, inmate pro se complaints must be liberally construed. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 562 (1972). If a valid claim is found to exist, then the case must proceed under the Federal Rules of Civil Procedure. *Watson v. Ault*, supra, at 893.

The problem, however, comes from the question of whether an inmate, proceeding in forma pauperis and pro se, has stated a valid claim or whether the complaint should be dismissed because the court finds it to be frivolous or malicious pursuant to 28 U.S.C. §1915(d). The efforts of the district courts to separate the meritorious claims from the frivolous or malicious claims have resulted in two conflicting lines of cases coming from the Fifth Circuit. The first line of cases is *Willard v. United States*, 422 F.2d 810 (1970); *Jones v. Bales*, 58 F.R.D. 453 (N.D. Ga., 1972), affirmed 480 F.2d 805 (1973); *Dickinson v. Chief of Police*, 499 F.2d 336 (1974); *Hardwick v. Ault*, 517 F.2d 295 (1975); *Watson v. Ault*, 525 F.2d 886 (1976); *Carter v. Thomas*, 527 F.2d 1332 (1976); and *Hurst v. Phelps*, (No. 78-1178, unpublished, decided June 19, 1978). These cases not only approve but encourage the use of judicially created procedures to separate the meritorious claims from the frivolous or malicious claims. The second, and conflicting line of cases, is *Ballard v. Spradley*, 557 F.2d 476 (1977); *Rasberry v. Spradling*, 558 F.2d 257 (1977); *Scott v. Estelle*, 567 F.2d 632 (1978); *Hurst v. Phelps*, (No. 78-1095,

unpublished, decided September 8, 1978) and *Mitchell v. Beaubouef*, 581 F.2d 412 (5th Cir., 1978). This second line of cases holds that such judicially created procedures do not conform to the Federal Rules of Civil Procedure.

The first or "*Watson v. Ault*" line of cases recognized the additional authority given to district courts by 28 U.S.C. §1915(d). In *Willard v. United States*, supra, a dismissal under Section 1915(d) was affirmed. This court specifically approved of the fact that the dismissal was based on facts outside of the pleadings, *Jones v. Bales*, supra, was the first case where the problems of pro se inmate cases was thoroughly discussed. The district court (and the Fifth Circuit, which affirmed based on the reasons set forth by the district court) found that Section 1915(d) is a very broad grant of discretion to the courts regarding management of in forma pauperis actions. The court then proceeded to dismiss as frivolous a case which had been litigated for eight months.

Dickinson v. Chief of Police, supra, merely affirmed a dismissal made on the basis of factual information outside the pleadings. The next case, *Hardwick v. Ault*, supra, saw the encouragement of the use of "special reports" in conjunction with Section 1983 litigation. In fact, the court emphatically stated that "district courts must make every effort to devise procedural innovations that will readily separate meritorious claims from frivolous claims . . . while preserving plaintiffs' rights under 42 U.S.C. §1983." The use of special reports and Section 1915(d) was expanded upon in *Watson v.*

Ault, supra. The Fifth Circuit specifically recognized the fact that district courts have the discretion to satisfy themselves as to whether an action is frivolous or malicious and that "it necessarily follows that the court must ascertain whether there is a factual basis for the petitioner's suit."

Carter v. Thomas, supra, involved that procedure used by the Southern District of Texas, which was very similar to the one used in this case. The Court found no fault with that procedure. Fault was found as to the amount of delay involved between submission of the suit and the filing of the complaint. In fact, this court affirmed the procedure, citing as authority, *Watson v. Ault.* In the latest case, *Hurst v. Phelps*, supra, the "judicious use of such 'special reports' was encouraged." (Dismissal of an inmate suit by the Middle District of Louisiana, where the procedure at issue here was used, was affirmed on September 27, 1978 in *Martin v. Blackburn*, No. 77-3149. However, the decision went off on the fact that the plaintiff had failed to state a cause of action and did not mention the District Court's procedure.)

In the second or "*Mitchell v. Beaubouef*" line of cases, the Federal Rules of Civil Procedure have been held to be paramount. The decisions seem to indicate that district courts have little or no discretion as to dismissal of a pro se inmate suit under Section 1915(d). They also disapprove of the use of evidence outside the four corners of the pleadings to help determine whether such a suit is frivolous or malicious.

The conflict between these two lines of decisions is clearly shown by comparing the decisions in the first *Hurst v. Phelps*, No. 78-1178 with the decision in this case. The use of the district court's procedure was approved in *Hurst* and disapproved here.

In the case of *Thomas Wayne Hurst v. C. Paul Phelps*, No. 78-1178, decided by the panel comprised of Judges Roney, Gee and Fay, the court held that:

> "A reading of the report [the investigative report prepared by the Louisiana Department of Corrections' penologist] shows that it contains a straight forward recitation of the facts underlying the dispute which is free from any bias. *We have previously noted that judicious use of such 'special reports' is to be encouraged.* See *Hardwick v. Ault*, 517 F.2d 295, 298 (5th Cir., 1975)." (Emphasis supplied).

As a result of the apparent conflict between the two lines of cases, several important questions have been raised. These questions concern the relationship between Section 1915(d) and the Federal Rules of Civil Procedure. To what extent do district courts have discretion to dismiss under Section 1915(d)? What evidence or procedures can they use in making such a determiniation? These questions must be answered if Section 1915(d) is to have any application; otherwise, Section 1915(d) will be virtually read out of the law altogether.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted:

WILLIAM J. GUSTE, JR.
Attorney General

BY:_____
ELLIS C. MAGEE
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Certificate of Service

I hereby certify that a copy of the above and foregoing petition for unit of certiorari has been placed in the United States mail, postage prepaid to plaintiff in proper person.

This day of February, 1979.

ELLIS C. MAGEE

APPENDIX A

REPORT OF MAGISTRATE POLOZOLA IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
CIVIL ACTION NO. 77-153

JOE NATHAN TUBBS,
Plaintiff,

VERSUS

RICHARD WALLS, LT. COL.
Defendant.

WEST, District Judge.

Appearances:

Joe Nathan Tubbs
In Proper Person
Louisiana State Penitentiary
Angola, Louisiana 70712

J. Marvin Montgomery
Assistant Attorney General
Office of the Attorney General
P. O. Box 44005, Capitol Station
Baton Rouge, Louisiana 70804
(Attorney for Defendant)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Joe Nathan TUBBS

versus

Richard WALLS, Lt. Col.

CIVIL ACTION

NO. 77-153

MAGISTRATE'S REPORT

The petitioner, Joe Nathan Tubbs, has filed this suit pursuant to 42 U.S.C. §1983 against Richard Walls, a correctional officer at the Louisiana State Penitentiary at Angola, Louisiana. Petitioner claims the defendant has denied him access to the Education Building located on the prison grounds.

After the suit was filed, the Court stayed these proceedings pending an investigation in accordance with administrative procedures previously approved by this Court. This report, prepared by an independent penologist associated with the Louisiana Correctional Services Division, has now been filed by the Court. This report reveals that petitioner has not been denied access nor is he presently being denied access to the Education Building. Furthermore, the report fails to show the

petitioner has been denied any federally protected rights.

Some discretion must be afforded prison officials regarding the movement of prisoners throughout the prison. There has been no abuse of discretion by prison officials in this case.

RECOMMENDATION

It is my recommendation that petitioner's suit be dismissed.

Baton Rouge, Louisiana, this 14th day of July, 1977.

UNITED STATES MAGISTRATE

APPENDIX B

JUDGMENT ORDER OF JUDGE WEST IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
CIVIL ACTION NO. 77-153

JOE NATHAN TUBBS

Plaintiff,

Versus

RICHARD WALLS, LT. COL.

Defendant.

WEST, District Judge.

Appearances:

Joe Nathan Tubbs
In Proper Person
Louisiana State Penitentiary
Angola, Louisiana 70712

J. Marvin Montgomery
Assistant Attorney General
Office of the Attorney General
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Baton Rouge, Louisiana 70804
(Attorney for Defendant)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Jce Nathan TUBBS

Versus

Richard WALLS, Lt. Col.

CIVIL ACTION

No. 77-153

JUDGMENT

For the reasons stated in the Report of the United States Magistrate dated July 14, 1977 and filed in the record of this case:

IT IS ORDERED, ADJUDGED AND DECREED that the demands of the plaintiff in this case be, and they are hereby DENIED, and this suit is hereby DISMISSED.

Baton Rouge, Louisiana, July 20, 1977.

UNITED STATES DISTRICT JUDGE

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NUMBER 77-2660

JOE NATHAN TUBBS,
Plaintiff-Appellant,

Versus

LT. COL. RICHARD WALLS,
Defendants-Appellees.

COLEMAN, GODBOLD AND TJOFLAT, Circuit Judges.

Appearances:

Joe Nathan Tubbs
In Proper Person
Louisiana State Penitentiary
Angola, Louisiana 70712

J. Marvin Montgomery
Assistant Attorney General
Office of the Attorney General
P. O. Box 44005, Capitol Station
Baton Rouge, Louisiana 70804
(Attorney for Defendant)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2660
Summary Calendar*

Joe Nathan TUBBS,
Plaintiff-Appellant,

Versus

Lt. Col. Richard WALLS,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Louisiana

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(October 5, 1978)

Before COLEMAN, GODBOLD AND TJOFLAT, Circuit Judges.

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*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

PER CURIAM:

Joe Nathan Tubbs, an inmate of the Louisiana State Penitentiary, filed a pro se complaint in the district court, alleging that he had been deprived of his constitutional rights in violation of 42 U.S.C. §1983 (1970). His complaint was dismissed pursuant to a procedure we have recently examined and found deficient in *Mitchell v. Beaubouef*, (No. 77-2656) F.2d (5th Cir. 1978). *See* 0*e.g.*, *Hurst v. Phelps*, (No. 78-1095) F.2d (5th Cir. 1978).

We, therefore, VACATE the dismissal of Tubb's complaint and REMAND for reconsideration by the district court in light of the procedural dictates set forth in *Mitchell.*

APPENDIX D

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE REPORTED CASE OF:

MITCHELL V. BEAUBOUEF

581 F.2d 412 (5th Cir., 1978)

Arthur MITCHELL, Gregory Robertson, and William Birtha, Plaintiffs-Appellants,

Versus

Michael BEAUBOULF et al., Defendants-Appellees.

No. 77-2656
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit

Sept. 18, 1978.

Three inmates of the Louisiana State Penitentiary filed a pro se complaint, alleging that they had been deprived of due process of law in a prison disciplinary hearing. After referring the complaint to a magistrate and receiving the magistrate's recommendation, the United States District Court for the Middle District of Louisiana, E. Gordon West, J., dismissed the suit with prejudice and, thereafter, granted leave to appeal in forma pauperis. The Court of Appeals held that : (1) the procedure whereby the case was summarily dismissed on the merits on the basis of an unverified administrative report submitted to the magistrate could not be countenanced, and (2) the prisoners' complaint stated a cause of action by alleging a denial of due process in a prison disciplinary proceeding.

Vacated and remanded.

*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

1. Prisons 4(3)

Although Court of Appeals was sympathetic to problems of district courts in management of pro se prisoner litigation, procedure whereby state prisoners' pro se complaint was summarily dismissed on the merits on the basis of an unverified administrative report that was filed by defendants in compliance with a magistrate's order could not be countenanced; although such unverified administrative reports may aid the district court in framing the issues for trial or summary disposition, they cannot be used to circumvent summary judgment requirements. Fed.Rules Civ. Proc. rule 56, 28 U.S.C.A.; 42 U.S.C.A. § 1983.

2. Federal Civil Procedure 2535, 2536

Under the summary judgment rule, factual statements should be submitted in affidavit forms; alternatively, they may be reduced to admissions through the invocation of, for example, Rule 36 or they may be made the subject of stipulation. Fed. Rules Civ.Proc. rules 36, 56, 28 U.S.C.A..

3. Federal Civil Procedure 2011

Procedure whereby magistrate makes factual determinations from evidence submitted in a manner not recognized by the Federal Rules of Civil Procedure clearly circumvents the letter and spirit of the Federal Rules. Fed.Rules Civ.Proc. rules 36, 56, 28 U.S.C.A.

4. Federal Civil Procedure 731, 1927

Where state prisoners' pro se civil rights complaint had been referred to a magistrate and the magistrate had ordered that defendants submit an administrative report to the court, unverified administrative report that was thereafter submitted by defendants should have been treated at most as an answer to the inmates' complaint, thus setting the stage for further pretrial proceedings in which, once the issues had been delineated, it could be determined whether any factual issues remained to be litigated in a bench trial or, if either party demanded it, in a trial by jury.

5. Federal Civil Procedure 2734

Upon a showing of poverty by the prisoner, a prisoner's pro se complaint must be filed.

6. Prisons 4(2)

In the context of pro se prisoner litigation, it is appropriate that complaints be given an expansive reading.

7. Federal Civil Procedure 1781

A prisoner's pro se complaint should not be dismissed unless it appears beyond all doubt that the prisoner can prove no set of facts under which he would be entitled to relief.

8. Federal Civil Procedure 2734

If the district court cannot ascertain from a prisoner's pro se complaint whether the complaint states a claim on which relief can be granted, the questionnaire approved by the Fifth Circuit in *Watson v. Ault* may be used as a pleading auxiliary.

9. Federal Civil Procedure 411

If a prisoner's pro se complaint is deemed legally sufficient under the liberal standard appropriate to pro se prisoner litigation, process must be served on the defendant. Fed.Rules Civ.Proc rule 4(a), 28 U.S.C.A.

10. Federal Civil Procedure 1877

A district judge may refer prisoner petitions challenging conditions of confinement to a magistrate. 28 U.S.C.A. § 636(b)(1)(B).

11. United States Magistrates 4

Where a prisoner petition challenging conditions of confinement is referred to a magistrate, the magistrate is authorized to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition of any pretrial motion, including motions for judgment on the pleadings, for summary judgment and for dismissal. 28 U.S.C.A. § 636(b)(1)(A, B).

12. Federal Civil Procedure 1836

Dismissal of a prisoner's pro se complaint for failure to state a cause of action should be without prejudice so that the inmate may file an amended complaint within a reasonable time.

13. Prisons 4(3)

In civil rights litigation challenging the conditions of prison confinement under the Civil Rights Act, a prisoner is not obligated to exhaust state administrative remedies. 42 U.S.C.A. § 1983.

14. Prisons 13(10)

Complaint wherein three inmates of Louisiana State Penitentiary alleged that they had been deprived of due process of law in a prison disciplinary hearing which resulted in their being sentenced to a "lock down" stated a claim upon which relief could be granted. 42 U.S.C.A. § 1983.

Appeal from the United States District Court for the Middle District of Louisiana.

Before COLEMAN, GODBOLD, and TJOFLAT, Circuit Judges.

PER CURIAM:

Arthur Mitchell, Gregory Robertson, and William Birtha, inmates of the Louisiana State Penitentiary, filed a pro se complaint in the district court, alleging that they had been deprived of their constitutional rights in violation of 42 U.S.C. § 1983

(1970). The court below handled the complaint in conformance with a procedure devised to process prisoner civil rights claims and dismissed it on the merits. Because we find the court's procedure, as applied in this case to be deficient, we vacate the order of dismissal and remand the case for further proceedings.

The inmates' complaint alleged that they had been deprived of due process of law in a prison disciplinary hearing, which resulted in their being sentenced to a "lockdown." They sought injunctive relief and damages.

The district court ordered that the complaint be filed in forma pauperis and immediately referred it to a magistrate. The magistrate stayed the case pending the exhaustion of state administrative procedures and ordered review of the complaint by the Louisiana Department of Corrections in accordance with the district court's unreported decision in *Michelli v. Henderson*, No. 74-296 (M.D. LA. Nov. 27, 1974).[1] In accordance with *Michelli*,

1. The district court's opinion in *Michelli* is set forth in appendix A. Also appended to this opinion, as appendices B and C, are the Magistrate's Report in *Michelli* and a memorandum from the Louisiana Department of Corrections, which detailed the procedures to be followed in handling prisoner complaints. The magistrate's order in the case before us refers to No. 76-296 as *Michelli v. Hunt*. We note here that the record in No. 74-296 is captioned throughout as *Michelli v. Henderson*.

the magistrate required that the defendants be served the complaint and that they submit an administrative report to the court within sixty days.

The defendants filed the administrative report within the allotted time. This unverified report stated that an administrative appeal had been granted in favor of the inmates and that a new, full hearing would be held. The inmates then moved for summary judgment, acknowledging that their administrative appeal had been granted but demanding damages for the allegedly unjust treatment they had already received.

On the basis of the unverified administrative report, the magistrate reported to the district judge that there was "no evidence of bad faith on the part of the board members" who conducted the first hearing, the subject of the inmates' complaint. Record at 42. The magistrate's report did not indicate whether he considered bad faith to be a necessary element of the inmates' cause of action or reasonable good faith to be an affirmative defense. In either event, the magistrate recommended that the complaint be dismissed without prejudice, reserving to the inmates the right to refile their complaint upon the completion of the new administrative hearings and any appeal that might follow. The district court dismissed the suit with prejudice, however, without the recommended reservation. Thereafter, it granted the inmates leave to appeal to this court in forma pauperis and certified that this appeal has been taken in good faith.

[1-4] Although this court is sympathetic to the

problems of the district courts in the management of pro se prisoner litigation, *e.g.*, *Taylor v. Gibson*, 529 F.2d 709, 713 (5th Cir. 1976), we cannot countenance the use of the summary procedure utilized in this case. This case was summarily dismissed on the merits on the basis of the unverified administrative report submitted to the magistrate. Although we have recognized that such reports may aid the district court in framing the issues for trial or summary disposition, *see id.* at 717, they cannot be used to circumvent the summary judgment requirements of rule 56, Fed.R.Civ.P. *See Hardwick v. Ault*, 517 F.2d 295, 298 (5th Cir. 1975) (the Federal Rules of Civil Procedure apply to section 1983 cases). Under the rule, factual statements, such as the defendants' report, should be submitted in affidavit form, or they may be reduced to admissions through the invocation, for example, of rule 36, Fed.R.Civ.P., or they may be made the subject of stipulation. The procedure established by the district court in *Michelli*, however, where the magistrate apparently is authorized to make factual determinations from evidence submitted in a manner not recognized by the rules, clearly circumvents the letter and spirit of the federal rules. At most, the defendants' report should have been treated as an answer to the inmates' complaint, thus setting the stage for further pre-trial proceedings in which, once the issues had been delineated, it could be determined whether any factual issues remained to be litigated in a bench trial, or, if either party demanded it pursuant to rule 38, Fed.R.Civ.P., in a trial by jury.

To the end that justice be done in these pris-

oner civil rights cases, we have outlined acceptable procedures in a series of opinions. *E. g., Taylor v. Gibson; Watson v. Ault*, 525 F.2d 886 (5th Cir. 1976); *Hardwick v. Ault; Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972). They bear repeating in the context of this case.

[5-8] The complaint must be filed upon a showing of poverty by the prisoner. *Watson v. Ault*, 525 F.2d at 892. The court below did file the inmates' complaint in forma pauperis. The Federal Rules of Civil Procedure call for the liberal reading of complaints by district courts. An even more expansive reading is appropriate in the context of pro se prisoner litigation. Such a complaint "should not be dismissed unless it appears beyond all doubt that the prisoner could prove no set of facts under which he would be entitled to relief." *Taylor v. Gibson*, 529 F.2d at 714. *E. g. Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 595-96, 30 L.Ed.2d (1972); *Watson v. Ault*, 525 F.2d at 891-92. If the district court cannot ascertain from the complaint whether it states a claim upon which relief can be granted, the questionnaire approved in *Watson v. Ault* may be used as a pleading auxiliary. The complaint in the case before us was filed on such a questionnaire form and clearly states a cause of action by pleading a denial of due process in a disciplinary hearing. *Wolff v. McDonnel*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

[9-11] If the complaint is deemed legally sufficient under the liberal standard appropriate to this type of case, then service of process on the defendant, as was done here, is required pursuant

to Fed.R.Civ.P. 4(a). *Watson v. Ault*, 525 F.2d at 893. In the case before us, the district court referred the complaint to the magistrate. Under 28 U.S.C.A. § 636(b)(1)(B) (West Supp. 1 (78), a district judge may refer prisoner petitions challenging conditions of confinement to a magistrate. In these cases, a magistrate is authorized "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any [pretrial] motion." *Id.* Such motions include motions "for judgment on the pleadings, for summary judgment, [and] to dismiss for failure to state a claim upon which relief can be granted." 28 U.S.C.A. §636(b)(1)(A) (West Supp.1978). The statute does not exempt magistrates from the Federal Rules of Civil Procedure, however.

[12, 13] The district court may dismiss the complaint if it is frivolous or malicious. 28 U.S.C. §1915(d) (1970). A dismissal of a pro se complaint for failure to state a cause of action should be without prejudice, however, so that the inmate may file an amended complaint within a reasonable time. *Hines v. Wainwright*, 539 F.2d 433, 434 (5th Cir. 1976). Further, in civil rights litigation challenging the conditions of confinement under section 1983, a prisoner is not obligated to exhaust state administrative remedies. *E. g., Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 1830, 1840-41, 36 L.Ed.2d 439 (1973); *Hardwick v. Ault.*

[14] Because of the nature of this type of litigation, the district court may find it advantageous to

require the defendant to submit a special report to aid in the management of the case. *Hardwick v. Ault.* As we stated above, however, the report, especially an unverified statement such as the one in issue here, cannot constitute a substitute for the type of proof required by the Federal Rules of Civil Procedure as a predicate for the summary disposition of a case. The magistrate below used the report as his source for findings of fact. Resolution of claims by such a method has been consistently condemned. *E. g., Scott v. Estelle*, 567 F.2d 632 (5th Cir. 1978); *Ballard v. Spradley*, 557 F.2d 476 (5th Cir. 1977); *Rasberry v. Spradling*, 558 F.2d 257 (5th Cir. 1977). Of course, had the report conformed to the requirements of Fed.R.Civ.P. 56, the district court could have relied on it in reaching summary judgment. Since it did not, the only recognized pleading before the district court was the inmates' complaint. Because on its face this complaint does state a claim upon which relief could be granted, we vacate the district court's dismissal and remand this cause for further proceedings consistent with this opinion and the Federal Rules of Civil Procedure.

VACATED and REMANDED.

APPENDIX A

JOHNNY MICHELLI
VERSUS

CIVIL ACTION
NUMBER 74-296

C. MURRAY HENDERSON, WARDEN
LOUISIANA STATE PENITENTIARY

E. GORDON WEST, District Judge.

This case, brought by the plaintiff, an inmate at Louisiana State Penitentiary, was referred by the Court to the United States Magistrate for his investigation, report and recommendation. The Report of the Magistrate, dated November 25, 1974, has been received and filed in the record of this case, and an independent review of this record by the Court leads to the conclusion that no evidentiary hearing is required in this matter. For the reasons stated in the Magistrate's Report:

IT IS ORDERED that this case be, and it is hereby DISMISSED, reserving to the plaintiff his right to apply to the Court in the future, if necessary, after having exhausted the administrative remedies available to him at the Louisiana State Penitentiary.

APPENDIX B
MAGISTRATE'S REPORT

This suit was filed by Johnny Michelli, an inmate at the Louisiana State Penitentiary at Angola, Louisiana, against C. Murray Henderson, the Warden of the prison. Petitioner filed this suit pursuant to 42 U.S.C. 1983.

In the complaint filed herein, petitioner alleges that he is in immediate need of hospitalization, and although certain doctors at the Louisiana State Penitentiary Hospital have recommended that he be hospitalized, the chief medical officer at the Louisiana State Penitentiary, Dr. H. M. Katz, has refused to allow petitioner to be hospitalized. Petitioner, therefore, seeks to have this Court issue an order compelling the defendant to have petitioner examined by a disinterested doctor.

On September 30, 1974, the Louisiana Department of Corrections issued a memorandum setting forth certain procedures for resolving inmate problems at the Louisiana State Penitentiary at Angola, Louisiana. A copy of this memorandum is attached to this report.

These procedures were adopted after numerous discussions between representatives of the Louisiana Department of Corrections and the United States Magistrate for the Middle District of Louisiana. The regulations as set forth by the Louisiana Department of Corrections basically follow Policy Statement Number 2001.6 issued by the United States Bureau of Prisons on February 14, 1974, which was entitled "Administrative Remedy of Complaints Initiated by Offenders in Bureau of

Prisons Facilities."

The purpose of adopting the procedures for resolving inmate problems both at the Louisiana State Penitentiary at Angola and in the federal prisons was to set up procedures by which inmates could seek formal review of complaints which relate to their imprisonment. This Court believes, as do the representatives of the Louisiana Department of Corrections, that most complaints can be resolved quickly and efficiently through direct contact with the staff who are responsible in the particular area of the problem complained of by the inmate. If the inmate is unable to resolve his problem at the staff level, or if the complaint is of a sensitive nature, the inmate has the right to set forth his complaint in a written statement to the Louisiana Department of Corrections. After the complaint is received by the Louisiana Department of Corrections, the matter will be investigated by an impartial staff of penologists who shall submit a report to the Director in order to allow her to render her decision within 30 days of the date of filing the complaint.

A review of the complaint filed by the petitioner in this case clearly shows that he has failed to exhaust these remedies available to him at the Louisiana State Penitentiary. The Fifth Circuit Court of Appeals has on a number of occasions stated that where there are administrative remedies available to prisoners, the inmate should first exhaust the proper administrative channels before presenting his grievance for judicial review. *Jones v. Carlson*, 495 F.2d 209 (5 Cir. 1974);

Thompson v. United States, Federal Prison Industries, 492 F.2d 1082 (5 Cir. 1974); *Paden v. United States*, 430 F.2d 882 (5 Cir. 1970). In *Paden v. United States*, which is cited with approval by the Fifth Circuit in *Jones v. Carlson*, supra, the Fifth Circuit Court of Appeals stated:

> "In the administration of federal prisons primary responsibility for supervision is delegated by statute to the Bureau of Prisons under the direction of the Attorney General, 18 U.S.C. § 4001 and 4042. Under that authority the Bureau has promulgated rules and regulations for the proper administration of the various prisons and has established effective means to review actions taken by local prison officials. *Green v. United States*, 283 F.2d 687 (3 Cir. 1960). In line with these regulations, grievances of prisoners concerning prison administration should be presented to the Bureau through the available administrative channels. Only after such remedies are exhausted will the court entertain the application for relief in an appropriate case."

The reasoning set forth by the Fifth Circuit Court of Appeals insofar as administrative rules apply to federal prisons should equally apply to administrative remedies afforded inmates by the state prisons.

It is the opinion of this Court that the state inmate in a state prison should be afforded the same rights and remedies afforded the federal inmate and federal prison for solving internal problems at the level having the most direct contact with the offender. Furthermore, such a procedure provides a means of continuous review of the administrative decisions and policies and provides a written record in the event there is a subsequent judicial review. More important, such a procedure

allows a complaint to be resolved quickly and efficiently without undue delay.

In the case now before the Court the petitioner states that some prison doctors have indicated he should be hospitalized but these doctors' recommendations have been rejected by the prison's chief medical officer. The inmate seeks a review of the decision rendered by the chief medical officer. It is this Court's opinion that this case is clearly an example of a case that should first be reviewed at the staff level of the Louisiana State Penitentiary and, if necessary, by the Director of the Department of Corrections before there is any judicial intervention in this matter.

Therefore, for the above reasons it is my recommendation that petitioner's suit should be dismissed for failure to exhaust the appropriate and available administrative remedies afforded him by the Louisiana State Penitentiary at Angola, Louisiana, reserving to him the right to proceed in this Court if necessary after he has exhausted those available remedies.

Baton Rouge, Louisiana, this 25th day of November, 1974.

(s) Frank J. Polozola
UNITED STATES MAGISTRATE

APPENDIX C

MEMORANDUM

TO: All Persons in the Custody of the Department of Corrections

FROM: Elayn Hunt, Director
DATE: September 30, 1974
SUBJECT: Procedures for Resolving Inmate/Student Problems

The purpose of this memorandum is to formally notify you of the procedures you should follow in seeking review of any complaints you may have during your confinement.

I

INSTITUTIONAL REVIEW. Most complaints can be resolved quickly and efficiently through direct contact with staff who are responsible in the particular area of the problem. Therefore, inmates and students should first seek assistance from the officials at their institutions (this could be a classification officer, dormitory officer, chaplin, superintendent, etc.).

II

REVIEW BY DIRECTOR. If the problem has not been resolved satisfactorily after exhausting the appropriate institutional channels, the inmate/student may then write the Director. The letter should clearly state the problem to be resolved. Ordinarily, the complaint must be filed within thirty days from the date the problem arose.

If an inmate's complaint is of a sensitive nature,

and he believes he could be unfavorably affected if it is known at the institution that he is making the complaint, he may file it directly with the Director. In such cases, he must clearly explain a valid reason for not seeking review within the institution.

Complaints may be sent in sealed envelopes to: Elayn Hunt, Director, Louisiana Department of Corrections, P. O. Box 44304, Capitol Station, Baton Rouge, Louisiana 70804.

The Director, or her representative, will notify the inmate of her decision within thirty days, excluding weekends, and holidays, after receiving the complaint. [Whenever possible, a decision will be reached in a shorter period of time. However, because of the shortage of staff and because of the many other matters which must be dealt with daily, it is not always possible to do the necessary investigating in less than thirty days.]

III

EXCEPTIONS. Nothing in this memorandum should be construed to affect in any way the procedures outlined in the Disciplinary Procedures of each institution, including the right to appeal decisions of the Disciplinary Board to the Director.

It should be clearly understood that the Director welcomes and encourages any inmate or student who wishes to air his views or make any suggestions or recommendations whatever to forward them as usual to the Director in a sealed envelope.

Elayn Hunt
Director